

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT ALEN MCCURRY,

Defendant and Appellant.

F076692

(Super. Ct. No. 4001581)

**ORDER MODIFYING OPINION AND
DENYING REHEARING
[CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the nonpublished opinion filed on May 9, 2019, be modified in the following particulars:

1. On page 2, in the first paragraph, immediately preceding “affirm,” insert the following:

By way of supplemental briefing, the parties agree remand is required in light of Senate Bill No. 1393 (2017–2018 Reg. Sess.; SB 1393). We remand for the trial court to consider whether to exercise its discretion to dismiss the prior serious felony conviction enhancement. In all other respects, we

2. On page 2, immediately following the heading, “DISCUSSION,” insert the following:

I. Minimum Sentence

3. On page 4, immediately before the heading, “DISPOSITION,” insert the following:

II. SB 1393

When defendant was sentenced, the trial court had no power to dismiss or strike a prior serious felony conviction enhancement imposed pursuant to section 667, subdivision (a). (See former § 1385, subds. (b), (c)(2); Stats. 2014, ch. 137, § 1.) On January 1, 2019, however, SB 1393 went into effect (Stats. 2018, ch. 1013, §§ 1, 2), and trial courts now have discretion to strike a prior serious felony conviction enhancement. The parties agree, as do we, that SB 1393 applies retroactively to defendant. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Accordingly, we will remand for the trial court to consider whether to exercise its newly granted discretion.

4. On page 5, immediately after the heading, “DISPOSITION,” and before “judgment,” insert the following:

The matter is remanded for the trial court to consider whether to exercise its discretion to strike the prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)). In all other respects, the

Except for the modifications set forth above, the opinion previously filed remains unchanged. This modification does effect a change in the judgment.

Appellant’s petition for rehearing filed on May 22, 2019, is denied.

FRANSON, A.P.J.

WE CONCUR:

MEEHAN, J.

SNAUFFER, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT ALEN MCCURRY,

Defendant and Appellant.

F076692

(Super. Ct. No. 4001581)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Louis M. Vasquez, for Plaintiff and Respondent.

-ooOoo-

* Before Franson, Acting P.J., Meehan, J. and Snauffer, J.

Defendant Scott Alen McCurry was convicted of torture, as well as other assaultive crimes. On the torture conviction, he was sentenced to seven years to life in prison. On appeal, he contends the trial court erred when it included his seven-year minimum parole ineligibility period as the minimum term of his life sentence. The People maintain the sentence was proper. We affirm.

PROCEDURAL SUMMARY

On August 25, 2017, defendant was convicted by jury trial of torture (Pen. Code, § 206;¹ count 5), domestic violence (§ 273.5, subd. (a); count 6), and various misdemeanors.

On December 11, 2017, the trial court sentenced defendant on count 5 to life in prison with the possibility of parole. The court stated that pursuant to section 3046, defendant would be required to serve a “mandatory sentence of seven years.” In addition, the court imposed a consecutive five-year term for a serious felony enhancement pursuant to section 667, subdivision (a), and stated that the total sentence on count 5 was thus 12 years to life.²

On December 12, 2017, defendant filed a notice of appeal.

DISCUSSION

Defendant argues that the only lawful sentence for the offense of torture is an indeterminate life sentence.³ He contends the trial court imposed an unauthorized

¹ All statutory references are to the Penal Code.

² The abstract of judgment reflects a seven-year-to-life sentence on count 5 and a separate five-year enhancement.

³ “[A]n ‘indeterminate’ sentence, ... means the defendant is sentenced to life imprisonment but the Board of Prison Terms can in its discretion release the defendant on parole. [¶] Some indeterminate sentences expressly include a minimum prison term. For example, the punishment for second degree murder is ordinarily ‘a term of 15 years to life,’ while first degree murder generally carries ‘a term of 25 years to life.’ (§ 190, subd. (a).) Other statutes specifying indeterminate sentences do not mention a minimum term, describing the sentence simply as ‘imprisonment in the state prison for life with the

sentence when it aggregated the minimum parole ineligibility period with the life sentence and characterized it as the minimum sentence. He asks that we modify the judgment.

“Torture is punishable by imprisonment in the state prison for a term of life.” (§ 206.1.) The minimum parole ineligibility period is addressed by section 3046: “An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.”

It is a common practice for trial courts to express a life term with a minimum parole ineligibility period as “x years to life.” (See, e.g., *People v. Garcia* (2017) 7 Cal.App.5th 941, 948 [sentence of 35 years to life imposed for “seven years to life for the attempted murder, plus a consecutive term of 25 years to life for the intentional discharge of a firearm enhancement, plus a consecutive term of three years for the great bodily injury enhancement”]; *People v. Caballero* (2012) 55 Cal.4th 262, 265 [sentence of 15 years to life imposed for attempted murder committed for the benefit of a criminal street gang]; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1010, 1026 [sentence of 15 years to life imposed for robbery in concert]; *People v. Campos* (2011) 196 Cal.App.4th 438, 442–446 [sentence of seven years to life imposed for attempted murder], disapproved on other grounds by *People v. Fuentes* (2016) 1 Cal.5th 218, 229, fn. 8.)

In *Jefferson*, the Supreme Court concluded this practice is not error. (*Jefferson*, *supra*, 21 Cal.4th at pp. 101–102, fn. 3.) *Jefferson* determined that “[t]he parole ineligibility period set by section 3046 is a minimum term” (*Jefferson*, at p. 96.) In a

possibility of parole’ or ‘imprisonment in the state prison for life.’ ” (*People v. Jefferson* (1999) 21 Cal.4th 86, 92–93 (*Jefferson*).)

footnote, the court stated: “By including the minimum term of imprisonment in its sentence, a trial court gives guidance to the Board of [Parole Hearings] regarding the appropriate minimum term to apply, and it informs victims attending the sentencing hearing of the minimum period the defendant will have to serve before becoming eligible for parole.” (*Jefferson*, at p. 101, fn. 3.)

Defendant argues *Jefferson*’s footnote 3 is merely dictum. It is well settled, however, that courts of appeal should generally follow the Supreme Court’s dicta. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) Furthermore, we see no persuasive reason to reject the Supreme Court’s view in *Jefferson*.

We recognize the appellate courts are split as to whether this practice constitutes error. And we recognize it is more accurate to describe the minimum term of confinement under section 3046 as the minimum parole ineligibility period or the minimum prison term before parole eligibility. But we agree with *Jefferson* that describing it as a minimum prison term communicates the meaning of section 3046 in a clear and understandable manner. (See *Jefferson, supra*, 21 Cal.4th at p. 101, fn. 3.) Thus, we adhere to *Jefferson*’s conclusion that the practice does not amount to error.

Accordingly, we conclude the trial court did not err in describing the minimum parole ineligibility period as the minimum prison term. We also conclude the court did not err when it added to that minimum the five-year term for the serious felony enhancement (§ 667, subd. (a)), for a total term of 12 years to life. (See § 669, subd. (a) [“Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction.”].)

DISPOSITION

The judgment is affirmed.